

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

LEE ERIC HEISER,
Petitioner.

No. 2 CA-CR 2020-0002-PR
Filed June 11, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Petition for Review from the Superior Court in Pima County
No. CR20162025001
The Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

The Law Offices of Stephanie K. Bond P.C., Tucson
By Stephanie K. Bond
Counsel for Petitioner

STATE v. HEISER
Decision of the Court

MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Chief Judge Vásquez and Judge Brearcliffe concurred.

S T A R I N G, Presiding Judge:

¶1 Petitioner Lee Heiser seeks review of the trial court’s ruling denying, after an evidentiary hearing, his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P.¹ “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4 (App. 2007). Heiser has not met his burden of establishing such abuse here.

¶2 After a jury trial in 2017, Heiser was convicted of two counts of possession of a dangerous drug for sale, possession of a narcotic drug for sale, possession of marijuana, possession of a dangerous drug, possession of a deadly weapon during the commission of a felony drug offense, possession of drug paraphernalia, and weapons misconduct.² The convictions arose from an unrelated incident in which Heiser was arrested at a residence with approximately \$790 in cash on his person, and, during a subsequent search of a bedroom in that house, officers found a gun, men’s clothing matching Heiser’s size, “Ziploc” bags, and a safe containing a baggie with alprazolam pills, marijuana, wrapped balls of heroin, LSD, and methamphetamine. DNA – specifically, a Y-STR profile consisting of only male DNA – discovered on some of the heroin packaging matched that of Heiser. The trial court sentenced Heiser to concurrent prison terms, the

¹ Effective January 1, 2020, our supreme court amended the post-conviction relief rules. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). The amendments apply to all cases pending on the effective date unless a court determines that “applying the rule or amendment would be infeasible or work an injustice.” *Id.* Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules.

² Pursuant to Heiser’s motion to sever the weapons misconduct charge, the trial court bifurcated the trial. After the jury rendered its verdicts on the other counts, Heiser waived his right to a jury trial on the weapons charge and the court found him guilty.

STATE v. HEISER
Decision of the Court

longest of which were twelve years. This court affirmed his convictions and sentences on appeal. *State v. Heiser*, No. 2 CA-CR 2017-0319 (Ariz. App. Aug. 7, 2018) (mem. decision).

¶3 Heiser initiated a proceeding for post-conviction relief, and, in his petition, he asserted two claims of ineffective assistance of trial counsel. First, Heiser argued his counsel had been ineffective in failing to consult with and call as a witness a DNA expert, who could have testified about a “potential contamination problem” and the “strength of the Y-STR profile.” Second, he asserted his counsel had been ineffective in failing to interview and call as a witness E.M., whom Heiser had met in jail and who had written a letter indicating the drugs in the safe belonged to him. The trial court determined that Heiser had “presented sufficient evidence of a colorable claim warranting an evidentiary hearing” as to both issues. At the hearing, a DNA expert, a private investigator, and Heiser testified in support of his petition, while the state offered the testimony of its DNA expert from trial and a videotaped deposition of Heiser’s trial counsel.

¶4 The trial court subsequently denied Heiser’s petition for post-conviction relief. The court concluded that Heiser’s trial counsel had not been “deficient in his performance with respect to failing to consult with a DNA expert or call a DNA expert at trial.” It explained that, “as a matter of experience and training,” Heiser’s counsel had “not necessarily need[ed] the assistance of a DNA expert,” and that he had been “competent in his cross-examination of the State’s DNA expert and successfully argued in closing[] that just because someone’s DNA appears on an item, it does not mean the person actually touched the item.” The court similarly determined that Heiser’s counsel had not rendered deficient performance with regard to E.M., noting that his decision was “rational” and “tactical[]” because he could not locate E.M. prior to trial and he had concerns about E.M.’s credibility as a witness. This petition for review followed.

¶5 To prevail on a claim of ineffective assistance of counsel, a defendant must establish both “that counsel’s performance fell below reasonable standards and that the deficient performance prejudiced him.” *State v. Roseberry*, 237 Ariz. 507, ¶ 10 (2015) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). “Failure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim.” *State v. Bennett*, 213 Ariz. 562, ¶ 21 (2006).

¶6 Under the first prong of the *Strickland* test, “we must presume ‘counsel’s conduct falls within the wide range of reasonable professional

STATE v. HEISER
Decision of the Court

assistance' that 'might be considered sound trial strategy.'" *State v. Denz*, 232 Ariz. 441, ¶ 7 (App. 2013) (quoting *Strickland*, 466 U.S. at 689). "Therefore, 'disagreements about trial strategy will not support an ineffective assistance claim if the challenged conduct has some reasoned basis, even if the tactics counsel adopts are unsuccessful.'" *State v. Varela*, 245 Ariz. 91, ¶ 8 (App. 2018) (quoting *Denz*, 232 Ariz. 441, ¶ 7). To show prejudice under the second prong, a defendant must establish there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

¶7 Heiser first argues the trial court erred in concluding that his trial counsel "was not ineffective for failing to consult with or call a DNA expert as a witness." He reasons that "[c]ounsel had no specialized knowledge in DNA, especially Y-STR DNA," and, without first consulting a DNA expert, he could not "reasonably evaluate the risks or benefits of calling an expert at trial." Heiser maintains this case is similar to *Denz*.

¶8 In *Denz*, this court stated that "the decision not to consult with an expert may qualify as sound trial strategy only if counsel had a reasoned basis justifying the decision." 232 Ariz. 441, ¶ 12. We explained that "Denz's trial counsel had no particular experience with medical testimony or with child abuse cases," and, "in the absence of any consultation with an independent medical expert, he lacked sufficient information to discern whether his chosen defense strategy . . . was the most appropriate strategy in mounting Denz's defense." *Id.* ¶ 13. Accordingly, we concluded that his counsel's "decision to not consult with an expert before settling on a defense strategy [could] not qualify as a reasoned decision" and "fell below prevailing professional norms." *Id.* ¶ 19. This case, however, is distinguishable from *Denz*.

¶9 Heiser's trial counsel had more than ten years' experience in criminal defense. He stated he was "familiar with DNA evidence in criminal cases," including drug cases, and had interviewed and cross-examined DNA analysts several times. Counsel explained that he had not called a DNA expert in Heiser's case because there was limited evidence involving DNA, there was evidence that Heiser was in the house, and he "thought that it would be more credible" to suggest "cross-contamination of the evidence" had occurred at the residence through cross-examination of the state's expert. To the extent that Heiser challenges his counsel's credibility, that is a determination for which we

STATE v. HEISER
Decision of the Court

defer to the trial court. *See State v. Fritz*, 157 Ariz. 139, 141 (App. 1988). On the record before us, we cannot say the court abused its discretion in concluding that his counsel's decision regarding a DNA expert did not fall below reasonable standards.

¶10 Moreover, Heiser has not established prejudice. As he did below, Heiser baldly asserts that he “probably would not have been convicted of the charges if the Jury would have heard about the problems with the DNA results and contamination.” Such speculation, however, is insufficient. *See State v. Rosario*, 195 Ariz. 264, ¶ 23 (App. 1999). In addition, Heiser's trial counsel cross-examined the state's expert on those precise issues and argued contamination of the DNA in closing. The trial court therefore did not err in rejecting this claim.

¶11 Heiser next argues the trial court erred in concluding his trial counsel had not been ineffective in failing to consult with E.M. or call him as a witness. He contends that his counsel's decision “was not strategic” because it was based on his counsel's “assumption[]” that E.M. would not be a credible witness. Heiser further maintains that any suggestion that his counsel did not interview E.M. because he could not find him “is not reasonable” because Heiser's investigator found multiple addresses for E.M. and E.M. was in and out of jail several times leading up to Heiser's trial.³

¶12 “[T]he decision as to what witnesses to call is a tactical, strategic decision,” requiring “the skill, training, and experience of the advocate.” *State v. Lee*, 142 Ariz. 210, 215 (1984). As the trial court pointed out, Heiser's trial counsel did not understand why E.M. would admit the drugs in the safe belonged to him and thought “it would come across as not true.” Heiser himself acknowledged that E.M. was a “shifty heroin addict.” This bears directly on E.M.'s credibility as a witness and provides a sound reason why counsel may have chosen to not call him as a witness. *State v. Goswick*, 142 Ariz. 582, 586 (1984) (attorney may choose not to call witness because participation in defense may harm defendant more than testimony will help).

¶13 Heiser's trial counsel also explained the efforts taken by his office to locate E.M., which included visiting at least two addresses and contacting family members. When his counsel found an attorney who represented E.M. and she offered to reach out to her client, Heiser did not

³E.M. died in September 2018.

STATE v. HEISER
Decision of the Court

want to continue the trial to do so.⁴ Any conflicting testimony offered by Heiser at the evidentiary hearing was for the trial court to evaluate. *See Fritz*, 157 Ariz. at 141. Because Heiser has not shown that his counsel's decision was the result of "ineptitude, inexperience or lack of preparation," *Goswick*, 142 Ariz. at 586, the court did not abuse its discretion in concluding that his counsel's performance did not fall below reasonable standards.

¶14 Moreover, Heiser has again failed to establish prejudice. As below, he summarily contends that he was prejudiced by his trial counsel's decision to not consult with or call E.M. as a witness because E.M.'s "handwritten letter addressed both Heiser's lack of possession and lack of knowledge." He assumes that E.M. would have testified consistently with the letter and that the jury would have believed him. Simply put, Heiser has failed to offer "some evidence of a reasonable probability that, but for counsel's [purported] unprofessional errors, the outcome . . . would have been different." *Rosario*, 195 Ariz. 264, ¶ 23. The trial court therefore did not err in rejecting this claim.

¶15 For the reasons stated above, we grant review but deny relief.

⁴The attorney who represented E.M. worked in the same office as Heiser's trial counsel, and Heiser's counsel thought, because of the potential conflict, that E.M. would need a new attorney if Heiser wanted E.M. to testify.